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 Before the
 Federal Communications Commission
 Washington, D.C. 20554

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In the Matter of)	
)	
Policies and Rules Governing Interstate Pay-Per-)	
Call and Other Information Services Pursuant to)	CC Docket No. <u>96-146</u>
the Telecommunications Act of 1996)	
)	
Policies and Rules Governing Interstate Pay-Per-)	
Call and Other Information Services, and Toll-free)	CG Docket No. 04-244
Number Usage)	
)	
Truth-in-Billing and Billing Format)	
)	CC Docket No. 98-170
Policies and Rules Implementing the Telephone)	
Disclosure and Dispute Resolution Act, Florida)	RM-8783
Public Service Commission Petition to Initiate)	
Rulemaking to Adopt Additional Safeguards)	
)	
Application for Review of Advisory Ruling)	
Regarding Directly Dialed Calls to International)	
Information Services)	
)	ENF-95-20
)	

NOTICE OF PROPOSED RULEMAKING AND MEMORANDUM OPINION AND ORDER

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By the Commission:

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I. INTRODUCTION

1. In this Notice of Proposed Rulemaking and Memorandum Opinion and Order (NPRM), we initiate a new proceeding to review the effectiveness of our rules governing pay-per-call services, related audiotext information services, and toll-free numbers.¹ Specifically, we seek comment on the state of the 900-number regime regulating pay-per-call services. We also seek comment on the effectiveness of consumer protections relating to toll-free numbers, and to those audiotext information services accessed through dialing methods other than 900 numbers. We are interested in learning whether we need to take additional steps to protect consumers. In addition, we seek comment on changes in technology that warrant re-examination and clarification of these rules.

2. We also close CC Docket No. 96-146, a rulemaking initiated in 1996 to implement portions of the Telecommunications Act of 1996 (1996 Act) governing pay-per-call and related information services. This docket was opened specifically for the purpose of implementing section 228 as amended by the 1996 Act.² In the Order and Notice of Proposed Rulemaking (1996 Order & NPRM), the Commission adopted new rules, incorporating much of the statute verbatim, and completed

¹ Pay-per-call services and other information services offer a variety of recorded and interactive information and entertainment programs. While pay-per-call services are currently confined to 900 numbers, other audiotext information services may be provided through other dialing sequences. See *infra* para. 8. Thus, pay-per-call services are encompassed by the larger category of audiotext information services discussed in more detail in this item.

² *Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services Pursuant to the Telecommunications Act of 1996*, CC Docket No. 96-146; *Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act*, CC Docket No. 93-22, Order and Notice of Proposed Rule Making, 11 FCC Rcd 14738, 14739, para. 2 (1996) (1996 Order & NPRM).

implementation of the new provisions of section 228. In addition, the Commission sought comment on several measures intended to curb the potential for evasions of the amended law.³ In the years since the rules took effect, the shape of the pay-per-call industry, technology in general, and regulatory perspectives have changed considerably. For reasons of administrative efficiency, detailed below, we now close that docket. Furthermore, we deny a related application for review.

3. We believe that our rules covering the pay-per-call services through 900 numbers, and those rules covering toll-free calls, provide important consumer protections. However, we are concerned that the use of other dialing mechanisms, and abuse of exceptions and exemptions, might also circumvent the consumer protections our regulations were designed to address. With this NPRM, we move to review the current situation, and take whatever actions are necessary to foster the flow of audiotext information services and the use of toll-free numbers, while ensuring consumers have adequate protections.

II. BACKGROUND

A. Telephone Disclosure and Dispute Resolution Act (TDDRA)

4. The Commission first adopted regulations governing interstate pay-per-call services in 1991 to address complaints of widespread abuse involving 900 number services.⁴ At that time, the Commission required pay-per-call programs to have preambles disclosing costs, required local exchange carriers (LECs) to offer consumers the option of blocking 900 numbers where technically possible, and prohibited common carriers from disconnecting basic telephone service for failure to pay pay-per-call charges.⁵ A year later, Congress enacted the TDDRA in an attempt to curtail abuses in pay-per-call, related services and toll-free numbers.⁶ The TDDRA charged both this Commission and the Federal Trade Commission (FTC) with adopting rules to expand consumer protections and promote the development of legitimate pay-per-call services.⁷ In response to burgeoning consumer complaints, the

³ 1996 Order & NPRM, 11 FCC Rcd at 14752, para. 41 ("It is our belief that in analyzing the effect of the new statutory requirements, we must look not only to the practices that are now prohibited but also to the likely responses of [information service providers] and common carriers who might seek to evade the statute. Our consideration of possible evasions is influenced by awareness of past evasions that have resulted in widespread deception and abuse. We believe that we should act now to discourage future abuse.").

⁴ See *Policies and Rules Concerning Interstate 900 Telecommunications Services*, CC Docket No. 91-65, Report and Order, 6 FCC Rcd 6166 (1991), recon., 8 FCC Rcd 2343 (1993).

⁵ 47 C.F.R. § 64.711, regulating the preamble requirements, was repealed once the preamble requirement of the Federal Trade Commission took effect. See *Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act*, CC Docket No. 93-22, RM 7990, Report and Order, 8 FCC Rcd 6885, 6904, para. 108 (1993) (*First TDDRA Order*). 47 C.F.R. § 64.713 and 714 were amended and renumbered as 47 C.F.R. § 64.1507 and 1508. See *First TDDRA Order*, 8 FCC Rcd at 6906-7 (Appendix B).

⁶ The Telephone Disclosure and Dispute Resolution Act of 1992, which added section 228 to the Communications Act of 1934, Pub.L. No. 102-556, 106 Stat. 4181 (1992) (*codified at* 47 U.S.C. § 228). Section 228 defines pay-per-call as, any service providing 1) a) audio information/entertainment, or b) access to simultaneous voice conversation, or c) any service – including the provision of a product – where the charges are assessed on the basis of completion of the call; 2) for which the caller pays a per-call or per-time charge greater than or in addition to the charge for transmission of the call; and 3) which is accessed through the use of a 900 number or other number designated by the Commission. 47 U.S.C. § 228(i)(1).

⁷ The Commission's regulations imposed obligations and constraints on carriers that transmit or bill for such services, while the FTC's authorizing statute covered the activities of information providers that produce pay-per-call programs and other entities, including common carriers, that perform pay-per-call billing and collection. See 15

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TDDRA also mandated explicit restrictions on the use of 800 and other toll-free numbers.⁸

5. In 1993, the Commission initiated a pay-per-call proceeding to implement TDDRA.⁹ The Commission adopted new regulations, and clarified that while all interstate services within the definition of pay-per-call must be provided through 900 numbers and any numbers it reserved for such services, audiotext information services outside the pay-per-call definition could be offered through other numbers.¹⁰ TDDRA specifically exempted several services from the pay-per-call definition, and therefore from the limitation of which prefixes they could be offered over: 1) certain directory services, 2) tariffed services, and 3) services for which users are assessed charges only after entering into a "presubscription or comparable arrangement."¹¹ The Commission defined presubscription and comparable arrangements in a way intended to prevent instant agreements which would circumvent consumer protections.¹² TDDRA also included restrictions on the use of toll-free numbers to charge callers, and similarly had an exception for preexisting agreements and the use of credit or charge cards. In 1996, when Congress revised the governing statute, section 228, the Commission closed the TDDRA proceeding and opened a new proceeding to implement the revisions.¹³

B. Telecommunications Act of 1996

6. The exceptions and exclusions of TDDRA created incentives for audiotext information providers to tailor services to avoid the pay-per-call regulation.¹⁴ In response, Congress revised section 228 in the 1996 Act to strengthen consumer protections. Among its revisions, Congress removed the exemption for tariffed services.¹⁵ It expanded restrictions on the use of toll-free numbers to charge callers¹⁶ and gave common carriers authority to terminate such service for audiotext information service

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U.S.C. §§ 5711(c) and 5721(c) (each stating that "communications common carriers shall be subject to the jurisdiction of the Commission for the purposes of [those subchapters]").

⁸ 47 U.S.C. § 228(c)(7).

⁹ *First TDDRA Order*, 8 FCC Rcd 6885.

¹⁰ See *Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act*, CC Docket No. 93-22, Order on Reconsideration and Further Notice of Proposed Rule Making, 9 FCC Rcd 6891, para. 1 (1994) (*TDDRA Order & FNPRM*). In the *TDDRA Order & FNPRM*, the Commission also proposed to amend our regulations to give telephone subscribers greater protection from fraudulent and deceptive practices associated with the use of 800 numbers to provide information services. See generally *id.*

¹¹ See 47 U.S.C. § 228(i)(2). The tariffed services exemption was removed when Congress revised the governing statute, section 228, with the enactment of the 1996 Act. See *1996 Order & NPRM*, 11 FCC Rcd at 14749, para. 33.

¹² For example, 47 C.F.R. § 64.1501(b), at that time, included the provision that any such arrangement must use a credit or charge card subject to the dispute resolution procedures of the Truth in Lending Act and Fair Credit Billing Act. A similar protection was adopted by the FTC. See 16 C.F.R. § 308.2(e).

¹³ See *1996 Order & NPRM*, 11 FCC Rcd at 14739, para. 2. ("We previously issued a Further Notice of Proposed Rule Making in CC Docket No. 93-22 to propose new rules to correct abuses involving 'presubscribed' information services and the use of 800 and other toll free numbers to charge subscribers for information services. Because the requirements of the 1996 Act accomplish the same goals as our TDDRA FNPRM proposals, we are terminating CC Docket No. 93-22.") (citations omitted).

¹⁴ See generally *1996 Order & NPRM*, 11 FCC Rcd 14738; see also *id.* at 14740-43, paras. 5-12.

¹⁵ 47 U.S.C. § 228(i); see also *1996 Order & NPRM*, 11 FCC Rcd at 14749, para. 33.

¹⁶ The 1996 Act added a new prohibition on the calling party "being assessed, by virtue of being asked to connect or otherwise transfer" to a pay-per-call service, a charge for the call to a toll-free number. See 47 U.S.C. §

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providers who violated provisions of the statute.¹⁷ The 1996 Act also noted that the remedies specified in section 228 are in addition to any other remedies available under the Commission's forfeiture authority.¹⁸

C. FCC Rules and Rulemakings

7. The Commission revised its rules to implement the amended section 228 in its *1996 Order & NPRM*.¹⁹ In doing so, the Commission incorporated many parts of section 228 directly. In addition, the Commission proposed new rules at that time intended to address potential circumvention of the regulations. The proposals targeted the use of non-900 numbers to provide what appear to be, in all other respects, pay-per-call services; the use of "instant" agreements and credit cards to take advantage of exemptions; and the effectiveness of toll-free protections.²⁰ The comments and reply comments in response to the *1996 Order & NPRM* were due in August and September 1996, before the revised rules themselves took effect in December 1996.²¹ On March 17, 2003, the Consumer & Governmental Affairs Bureau (CGB) issued a Public Notice seeking to refresh the record in this proceeding.²²

III. NOTICE OF PROPOSED RULEMAKING

A. Background

8. Section 228 establishes a system of oversight and regulation of pay-per-call services and also related audiotext information services to protect consumers.²³ Pay-per-call service is defined in section 228 as:

any service (A) in which any person provides or purports to provide—(i) audio information or audio entertainment produced or packaged by such person; (ii) access to simultaneous voice conversation services; or (iii) any service, including the provision of a product, the charges for which are assessed on the basis of completion of the call; (B) for which the caller pays a per-call or per-time-interval charge that is greater than, or in addition to, the charge for transmission of the call; and (C) which is accessed through use of a 900 telephone number or other prefix or area code designated by the Commission in accordance with [another section 228 provision].²⁴

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228(c)(7)(E). It also prohibited charges without written agreements, or use of credit or charge cards. See 47 U.S.C. § 228(c)(7)(C). And it added a requirement for the use of Personal Identification Numbers when written agreements are used. 47 U.S.C. § 228(c)(8)(C).

¹⁷ 47 U.S.C. § 228(c)(8)(E). See also 47 U.S.C. § 228(e) (limiting carrier liability for such terminations).

¹⁸ 47 U.S.C. § 228(c)(8)(F).

¹⁹ *1996 Order & NPRM*.

²⁰ *1996 Order & NPRM*, 11 FCC Rcd at 14751-54, paras. 39-45.

²¹ See Rules and Regulations Federal Communications Commission 47 C.F.R. Part 64 Interstate Pay-Per-Call and Other Information Services, Final Rule, 61 FR 39084-01 (July 26, 1996).

²² *The Consumer & Governmental Affairs Bureau Seeks Comment to Refresh the Record on the Commission's Rules Governing Interstate Pay-Per-Call & Other Information Services*, CC Docket No. 96-146, Public Notice, DA No. 03-807 (rel. March 17, 2003) (*2003 Notice*).

²³ For example, there are disclosure and billing requirements designed to protect consumers.

²⁴ 47 U.S.C. § 228(i)(1).

9. Currently, the Commission has not designated any other telephone number, prefix or area code beyond 900 numbers as pay-per-call services.²⁵ As previously stated, section 228 addresses broader issues than the terms "900-number services" and "pay-per-call services." For example, the statute has criteria, implemented by Commission rules, which govern the manner in which information outside the pay-per-call definition can be provided via toll-free numbers for a fee.²⁶ Therefore, we use the term "audiotext information services" to refer to the broader umbrella of services related to pay-per-call. We note that the term pay-per-call is a subset of audiotext information services as we now use that term.²⁷

B. Discussion

1. Toll-free Numbers

10. The Commission's rules, which implement the statute virtually verbatim, have detailed criteria that must be met in the limited circumstances under which calls involving toll-free numbers can be used for purchases of goods and services, including audiotext information services. Our rules and the statute already require common carriers, including small carriers, to use contracts or tariffs to prohibit their customers from using 800 numbers in ways that are thought to leave consumers without the benefit of protections against fraud. For example, carriers must prohibit the use of 800 numbers, or any other numbers advertised or widely understood to be toll-free, in a way that the calling party is charged for information, with limited exception.²⁸ There are exceptions for charges where there are presubscription agreements or use of certain credit and charge cards.²⁹ The only way to have information charges that appear on a consumer's phone bill is through a presubscription agreement which in most cases must be in writing, include specific disclosures, and use personal identification numbers for access to the service.³⁰

11. However, despite these protections, the Commission continues to receive complaints in this area. In the first six months of 2004, the Commission received close to 5,000 complaints that referenced toll-free numbers.³¹ We are interested in finding out why, with these protections, there are still complaints in this area. For example, are there many problems for consumers when charge cards are used for payment?³² Do more problems occur, for example, when the written agreement does not require the use of a personal identification number?³³ We seek comment on possible solutions.

²⁵ See 47 C.F.R. § 64.1506.

²⁶ See, e.g., 47 U.S.C. § 228(c)(7)(C); 47 C.F.R. § 64.1504.

²⁷ *Contrast Telephone Publishing Corporation and Telemedia Network, Inc. D/B/A International Telnet*, File No. ENF-97-02, Notice of Apparent Liability for Forfeiture, NAL/Acct. No. 716EF0001, 12 FCC Rcd 21,384 at 21,385 (1997) ("Pay-per-call services, also known as 'audiotext' or '900' services, provide telephone users with a variety of recorded and interactive information programs for which they are charged rates different from, and usually higher than, the normal transmission rates for ordinary telephone calls.")

²⁸ 47 U.S.C. § 228(c)(7); 47 C.F.R. § 64.1504.

²⁹ 47 U.S.C. § 228(c)(7); 47 C.F.R. § 64.1504.

³⁰ 47 U.S.C. § 228(c)(7)-(9); 47 C.F.R. § 64.1504. Excused from the specific criteria for the written agreement are calls using telecommunications devices for the deaf, certain directory services, and the purchase of goods or services that are not information services. 47 U.S.C. § 228(c)(8)(D); 47 C.F.R. § 64.1504(f)(1).

³¹ There were 4,933 complaints received during approximately the first six months of calendar year 2004 that referenced toll-free numbers, but not all of these necessarily involved toll-free related issues.

³² See 47 U.S.C. § 228(c)(9); 47 C.F.R. § 64.1504(c)(2).

³³ See 47 U.S.C. § 228(c)(8)(C) and (D); 47 C.F.R. § 64.1504(f)(1).

a. Protection for Line Subscribers as well as Callers

12. Section 228 and our rules governing toll-free calls explicitly protect “the calling party” from being charged for information conveyed during the call unless meeting the criteria discussed above.³⁴ In the *1996 Order & NPRM*, the Commission discussed the possibility of extending the toll-free number protections that apply to the “calling party,” so that they also apply to the “subscriber to the originating line.”³⁵ We believe this proposal is still valid today. For directly-dialed toll calls placed without a calling card, it is the subscriber – not necessarily the calling party – who is assessed charges for calls placed over that line. It would not seem appropriate for an individual calling a toll-free number to be protected from incurring charges without extending the same protection to the individual or entity billed for the calls. We seek comment on whether we should amend section 64.1504 of our rules explicitly to protect the subscriber as well from the practices that Congress has chosen to prohibit. Would such an amendment help to protect small businesses from calls made by employees?

b. Use of Number Identification for Billing through Toll-Free Numbers

13. Section 228(c)(7)(A) of the 1996 Act prohibits “the calling party being assessed, by virtue of completing the call [to a toll-free number], a charge for the call.”³⁶ In the *1996 Order & NPRM*, the Commission adopted a rule that mirrors that portion of section 228 and also prohibits such conduct.³⁷ In order to assess charges for directly dialed toll calls, common carriers identify the telephone line used to originate a toll call and assess charges to the subscriber to that line. The Commission generally has held telephone subscribers responsible for toll charges resulting from unauthorized use of their telephone lines.³⁸ However, in the past, the Commission has received complaints that parties were using such information to bill callers for services from calls made to toll-free numbers.³⁹

14. In the *1996 Order & NPRM*, the Commission also tentatively concluded that a carrier’s billing of calls dialed to 800 or other toll-free numbers on the basis of one such technology, Automatic Number Identification (ANI), amounted to assessing charges on the basis of completion of the call, and therefore violated section 228(c)(7)(A) of the Act, unless the call involved use of telecommunications devices for the deaf.⁴⁰ At that time, commenters generally agreed that a carrier’s billing of toll-free calls

³⁴ See 47 U.S.C. § 228(c)(7)(C) and (c)(8)-(9); see also 47 C.F.R. § 64.1504.

³⁵ *1996 Order & NPRM*, 11 FCC Rcd at 14753, para. 44. The calling party could be someone other than the subscriber, for example, a visitor to the subscriber’s home.

³⁶ 47 U.S.C. § 228(c)(7).

³⁷ 47 C.F.R. § 64.1504(c).

³⁸ See, e.g., *Gerri Murphy Realty, Inc. v. AT&T Corp.*, File No. EB-01-TC-F008, Memorandum Opinion and Order, 16 FCC Rcd 19134 (2001).

³⁹ See *1996 Order & NPRM*, 11 FCC Rcd at 14740-41, paras. 6-7.

⁴⁰ The term “ANI” refers to the delivery of the calling party’s billing number by a local exchange carrier to any interconnecting carrier for billing or routing purposes, and to the subsequent delivery to end users. See 47 C.F.R. § 64.1600(b). See also *1996 Order & NPRM*, 11 FCC Rcd at 14754, para. 45. Telecommunications devices for the deaf utilize ANI to identify the telephone subscriber to be billed. The Commission also made a tentative conclusion that ANI-based billing also violates 201(b) in the *1996 Order & NPRM*. See *1996 Order & NPRM*, 11 FCC Rcd at 14754, para. 45; see also 47 U.S.C. § 228(c)(7), 47 C.F.R. § 64.1504(c), and 47 U.S.C. § 201(b). Section 201(b) requires that all charges and practices for and in connection with any common carrier communications services be just and reasonable.

on the basis of ANI violated the statute.⁴¹ In the interests of collecting a more complete record to include newer technology, we now seek comment on whether we should specifically prohibit billing calls dialed to 800 or other toll-free numbers on the basis of not just ANI, but equivalent information, automatically provided calling number identification.⁴²

2. Audiotext Information Services, Including Pay-Per-Call Services

a. Consumer Protection in General

15. The Commission's rules governing pay-per-call services are meant to be a framework of consumer protections for these audiotext information services. The rules require, first, that consumers are given appropriate information, such as pricing, so they can make informed decisions about services.⁴³ Second, consumers are meant to be able to choose to block unwanted access to the pay-per-call services, for free or at a reasonable cost.⁴⁴ And third, consumers are supposed to be protected from losing local or long-distance services for nonpayment of charges for pay-per-call services.⁴⁵ However, we are concerned that as audiotext information services have migrated increasingly outside the pay-per-call setting, consumers, including small business consumers, have lost some of these basic protections.⁴⁶

16. Consumer disclosure requirements for audiotext information services only apply to services over 900 numbers, and, as above, some calls over toll-free numbers.⁴⁷ Similarly, alternative dialing routes circumvent subscriber blocking, allowing even children to obtain access to audiotext information services.⁴⁸ Additionally, consumers' calls are sometimes rerouted without their authorization through specialized long-distance carriers designed to accumulate high rates for what are advertised as

⁴¹ See, e.g., AT&T Corp. 1996 Comment at 3, FPSC 1996 Comment at 5, GTE 1996 Comment at 3, MCI 1996 Comment at 5, NAAG 1996 Comment at 8, Pacific Bell/Nevada Bell 1996 Comment at 9, University of Missouri-Columbia 1996 Comment at 5, Young Families 1996 Comment at 3. Unless otherwise noted, "Comment" refers to items filed in CC Docket 96-146.

⁴² See, e.g., 47 C.F.R. § 64.1600(d) (charge number – conveying similar information in a System 7 environment).

⁴³ The Commission rules require carriers themselves to disclose information, and/or to require disclosure through contract or tariff. See 47 C.F.R. § 64.1502, 1504, and 1509. The rules require compliance with Titles II and III of TDDRA, and the FTC's implementing rules. See 16 C.F.R. § 308.5 (FTC's rules relating to pay-per-call).

⁴⁴ 47 U.S.C. § 228(c)(5). See also 47 C.F.R. § 64.1508.

⁴⁵ 47 U.S.C. § 228(c)(4). See also 47 C.F.R. § 64.1507.

⁴⁶ See *infra* paras. 22-23. During approximately the first six months of 2004, the Commission received at least 275 complaints referring to 900 numbers themselves. Because of the complex nature of some dial-around calls, more complaints stemming from unauthorized charges appearing on the telephone bills could be amongst the thousands of complaints the Commission receives about cramming or billing disputes. See, e.g., *Long Distance Direct, Inc., Apparent Liability for Forfeiture*, File No. ENF-99-01, Memorandum Opinion and Order, 15 FCC Rcd 3297 (2000) (forfeiture for membership to psychic hotline and other charges placed on telephone bills for enhanced services categorized as cramming prohibited under section 201(b)).

⁴⁷ See 47 C.F.R. § 64.1504 and 1509. See also *supra*, para. 10.

⁴⁸ While a consumer might block 900 numbers from being dialed from her household, the block does not prevent anyone from dialing non-900 numbers even if those provide access to audiotext information services the consumer is trying to stop. For example, in June 2003, the father of a 12-year-old Internet user complained to the FCC that he had received a bill for \$289 in long-distance calls despite having blocked long-distance calls and having denied his son the charge cards for purchases over the Internet. "I had no idea that while surfing the Internet, a company could trace back to our home telephone number and add a charge to our telephone bill. Is that legal? As a parent, how do I control such charges?" the Salt Lake City man asked.

free information services. Under those conditions, consumers can end up being disconnected for what are essentially services that arguably should be covered by pay-per-call protections. In this rulemaking we explore several of these areas, and seek comment on the best way to address concerns of consumers, without hindering legitimate businesses, including small and new businesses.

17. One such example of an item outside the standard pay-per-call application is a phenomena known informally as “modem hijacking.” The Commission has received complaints about local calls which are redirected without the caller’s authorization through software programs, which disconnects Internet users’ calls and dial international numbers often through carriers other than those chosen by subscribers for their long-distance calls.⁴⁹ Sometimes there is no way to disconnect the call other than to unplug the telephone line. Furthermore, the placement of a call to an international telephone number in situations like this does not necessarily mean it connects through the country to which it is assigned.⁵⁰

18. Although the FTC has addressed some cases in this area,⁵¹ we seek comment on whether additional actions are needed from the FCC. We invite commenters to offer specific proposals consistent with our section 228 authority. We have on a case-by-case basis looked at some parameters of using 201(b) to review certain relationships between carriers and information providers in chat-line cases.⁵² We seek comment on the broader policy of what factors and concerns we should take into account in making decisions regarding the broad practices and conduct in this general area, including whether we should consider revoking carriers’ section 214 certification for such conduct.⁵³ We seek comment on whether consumers should be given protections to allow call disconnection.

b. The 900 Number Regime

19. Section 228 also requires the Commission to identify procedures that common carriers and pay-per-call providers, including small carriers and providers, can use to protect against nonpayment

⁴⁹ In 2001, the Commission began separately tracking complaints about international Internet dial-up problems, a growing complaint. During approximately the first six months of 2004, the FCC received 265 complaints about these situations in which telephone subscribers suddenly found their local phone calls for Internet access redirected through international channels at high per-minute rates.

⁵⁰ See *FTC v. Verity Int’l, Ltd.*, 124 F.Supp.2d 193, 195-196 (S.D.N.Y. 2003) (charges on telephone bill as calls to Madagascar even though no calls were actually put through to Madagascar). An international common carrier was prosecuted by the FTC after a dialer computer program supplied by defendants automatically downloaded to the user’s computer, disconnected the user’s modem from its Internet Service Provider, and placed a call to a Madagascar telephone number assigned to the company. The company received revenue from those calls, even if terminated outside of Madagascar.

⁵¹ See, e.g., *FTC v. BTV Industries, Rik Covell, Adam Lewis, National Communications Team, Inc., LO/AD Communications Corp., and Nicholas Loader*, CV-S-02-0437-LHR-PAL, Complaint, and Temporary Restraining Order (D Nev. 2002) (alleging defendant sent e-mail messages claiming that consumers had won a prize, and when consumers responded, routing the calls to an adult Internet site via a 900-number modem connection generating high per-minute rates). In that case, the FTC alleged that the defendant’s practices were deceptive and misleading by, among other things, leading consumers to believe that the connection to the web site was toll-free. See, also, *FTC v. Verity Int’l, Ltd.*, 194 F.Supp.2d 270, 276 (S.D.N.Y. 2002) (FCC supported the FTC action in a friend of the court brief).

⁵² See *infra* paras. 29-32. See, e.g., *Beehive v. AT&T*, 17 FCC Rcd 11641 (2002); *AT&T Corp. v. Jefferson Telephone Co.*, Memorandum Opinion and Order, 16 FCC Rcd 16130 (2001) (*Jefferson*).

⁵³ See 47 U.S.C. § 214.

of legitimate charges.⁵⁴ Pay-per-call providers have recently commented that audiotext information service providers have moved outside the 900 number regime because it has become a difficult environment in which to operate.⁵⁵ In addition, AT&T Corp. noted that pay-per-call providers may avoid federal regulation by using revenue sharing agreements and instant credit to mask services that otherwise would be regulated as pay-per-call.⁵⁶

20. The use of 900 numbers has dropped dramatically in the past five years. For example, the number of assigned 900 numbers, which peaked in 1999 with 447 distinct 900 NXX codes,⁵⁷ had dropped to 206 by the end of 2002.⁵⁸ Many of those numbers are not actually used by end users.⁵⁹ Many carriers decline to provide transport or bill for 900 numbers.⁶⁰ Further, some pay-per-call providers claimed that carriers forgive disputed pay-per-call charges repeatedly for the same subscribers without instituting 900 number blocking in those cases.⁶¹ One participant expressed concern that the health of the 900 number rules, if applicable, is crucial to market and consumer confidence.⁶² Clearly the Commission does not want to direct pay-per-call providers to a system that does not function. We seek comment on

⁵⁴ 47 U.S.C. § 228(b)(4).

⁵⁵ See, e.g., Network for Online Commerce 2003 Comment at 8, Pilgrim Telephone, Inc. 2003 Comment at 2, HFT, Inc., Lo-Ad Communications T.B.I. and Global Charge 2003 Joint Comment at 13-14, Simpson 2003 Comment at 2.

⁵⁶ See AT&T Corp. 2003 Comment at 7 (alleging abusive compensation sharing arrangements involving audiotext information service providers).

⁵⁷ In 2001, there were 228 assigned. In 2000 the number was 311, which is the 2001 number minus one new code assigned in 2001, plus the 84 reclaimed in 2001. The 1999 total was 445, as none were assigned in 2000 when another 134 were reclaimed. See NANPA 2001 Annual Report at 13 (North American Numbering Plan Administration) (available at <www.nanpa.com/reports/reports_annual.html>).

⁵⁸ NANPA 2002 Annual Report at 8 (available at <www.nanpa.com/reports/reports_annual.html>).

⁵⁹ National carriers reported recently that for about half of the 900 NXX codes they hold, no more than 35% of those numbers are actually used by end users. See, FCC Releases Telephone Numbering Resource Utilization Report, Federal Communications Commission, Table 9 (July 2003) (Number Utilization for Specialized Nongeographic Area Codes as of December 31, 2002). Canada held 62 of the codes, therefore, no more than 144 could be held by national carriers, which reported utilization information for only 65 of the codes. Utilization data showed that 63.5 percent of those were still available for use. Carriers are required to report numbering usage data. See *Numbering Resource Optimization, Report and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 7574 (2000).

⁶⁰ Commenters stated that AT&T Corp. abandoned billing for most services and notified customers that they will be discontinuing transport as of December 31, 2003. (Network for Online Commerce 2003 Comment at 7, Pilgrim Telephone, Inc. 2003 Comment at 28). Commenters stated that MCI does not accept new applications for service, and only provides services through a few brokers. (Network for Online Commerce 2003 Comment at 8). Commenters stated that Sprint closed its 900 telemedia office almost 10 years ago (HFT, Inc., Lo-Ad Communications T.B.I. and Global Charge 2003 Joint Comment at 13-14 n.7). In 1998, Verizon asked the New York Public Service Commission to allow it to end services to pay-per-call information providers because it no longer wished to provide billing and collection service, and because usage had declined. *Chladek v. Verizon N.Y. Inc.*, No. 02 Civ 2355(RO), 2003 WL 21305347 at 1 (S.D.N.Y. 2003) (also citing Y2K concerns).

⁶¹ See, e.g., Northwest Nevada Telco 2003 Comment at 1, MicroVoice Applications, Inc. 2003 Comment at 2; see also 47 C.F.R. § 64.1511 and 1512. As noted in the *First TDDRA Order*, Congress specifically cited the example of a consumer who "has chronic complaints" about pay-per-call transactions as an example of when involuntary blocking could be appropriately applied. See *First TDDRA Order*, 8 FCC Rcd 6885 at 6901 n.148.

⁶² See Letter from Peter J. Brennan, Mobile Entertainment Forum, to Marlene Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-145 (filed October 28, 2003) (*Ex Parte* filing, Mobile Entertainment Forum).

what steps can be taken to ensure the 900 number regime functions properly.

21. One commenter noted that a practice used in the United Kingdom requiring pay-per-call providers to record the customer's voice greatly reduced disputes over charges.⁶³ We seek comment on whether it would be appropriate to allow carriers to accept recordings of customer's oral verification that they understand and agree to the charges as evidence that charges should not be forgiven. We seek comment from pay-per-call providers on whether such items would be necessary.

c. Presubscription or Comparable Arrangement

22. As noted previously, the Commission requires services meeting the pay-per-call definition to be accessed only through 900 numbers, and the only ways that audiotext information services fall outside the pay-per-call definition, and therefore the requirement that they be offered only over 900 numbers, are 1) by being directory services as described in the statute, or 2) to have charges assessed only after there is a "presubscription or comparable agreement."⁶⁴ In the 1996 Order & NPRM, the Commission sought comment on refining the definition of presubscription and comparable agreement so that it is clear what criteria must be met for all audiotext information services other than directory services to be offered over numbers outside of the 900 prefixes, including those services using toll-free numbers.⁶⁵ Rather than having the Commission designate all prefixes as pay-per-call prefixes to ensure protection for consumers, the Commission proposed to make clear that to operate outside of 900 numbers, all audiotext information services (other than directory services) must either have presubscription agreements executed in writing or, alternatively, require that payments be made through direct remittance, prepaid account, or debit, credit, charge or calling card. For example, this proposal would apply such protections to 500 numbers, 700 numbers, plain old telephone service and international numbers when used to provide audiotext information services.

23. We again seek comment on the usefulness and practicality of such a proposal. In particular, we ask whether this proposal would be adequate to balance the need to protect consumers, but allow businesses to develop. In particular, how would this proposal effect small businesses? Are small businesses already keeping such records? In addition, we seek comment on whether there is still a need for such changes in this area given developments in electronic commerce and related laws, and the now-common use of third-party verifications in telephone transactions.

24. We also seek comment on whether we need to modify our existing and proposed rules given our obligations under the Electronic Signatures in Global and National Commerce Act (E-Sign Act).⁶⁶ Under the E-Sign Act, a contract or business transaction cannot be denied validity or enforceability solely because the contract or transaction is not in writing, so long as the contract or transaction is a properly authenticated electronic record or has been affirmed by an electronic signature.⁶⁷ The E-Sign Act provides a specific framework for the use of electronic records and signatures and places

⁶³ Simpson 2003 Comment at 1-2 (stating that all pay-per-call calls were required to record the voice of the caller so it could be identified).

⁶⁴ 47 U.S.C. § 228(i) and (b)(5).

⁶⁵ See 47 U.S.C. § 228(i)(2).

⁶⁶ Electronic Signatures in Global and National Commerce Act, S. 761, 106th Cong., 2d Sess. (signed into law June 30, 2000).

⁶⁷ See also *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers*, CC Docket No. 94-129, Third Report and Order, 15 FCC Rcd 15996, at 16002-03, paras. 12-14 (2000).

limits on the interpretation authority of federal and state regulatory agencies with regard to this framework. We seek comment on how we might best adjust our current and proposed requirements for presubscription or comparable agreements to best comply with the E-Sign Act.

3. Billing

25. Section 228 and our rules already mandate certain billing practices for pay-per-call services and 800 numbers billed via the telephone bill.⁶⁸ Telephone billing of subscribers for any pay-per-call services must already display any such charges “in a part of the subscriber’s bill that is identified as not being related to local and long distance telephone charges,” and, at a minimum, describe the type of service, the amount of the charge, and the date, time, and duration of the call. There must also be a clearly-identified toll-free number established for customers to call with any questions.⁶⁹ For toll-free numbers used to bill items on a telephone bill, the number called must be listed clearly with a disclaimer in prominent type that neither local nor long distance service could be disconnected for “failure to pay disputed charges for information services.”⁷⁰

26. In addition, the Commission has developed rules and guidelines in the *Truth-in-Billing* proceeding to ensure that all telephone billing is readily discernable to consumers.⁷¹ In general, charges must be accompanied by “a brief, clear, non-misleading, plain language description of the service or services rendered” that allows consumers to “accurately assess that the services for which they are billed correspond to those that they requested and received,” and that the costs “conform to their understanding of the prices charged.”⁷² The *Truth-in-Billing Order* requires that telephone bills highlight changes in or additions of new providers, but non-recurring pay-per-call services are specifically exempt from that requirement.⁷³

27. We seek comment on whether our existing rules governing billing specifically for pay-per-call services and those for charges billed through toll-free numbers, in combination with our *Truth-in-Billing* rules and guidelines, are sufficient to address any current billing concerns.⁷⁴ We seek comment specifically on whether we should adopt a rule stating that charges for presubscribed audiotext information services accessed through toll-free numbers must be displayed separately from local and long-distance telephone service.⁷⁵ How would such a rule affect small carriers?

⁶⁸ See 47 U.S.C. § 228(c)(8)(B) and (d)(4); see also 47 C.F.R. § 64.1504, 1509 and 1510.

⁶⁹ 47 U.S.C. § 228(d)(4); see also 47 C.F.R. § 64.1509(b) and 1510(2).

⁷⁰ 47 U.S.C. § 228(c)(8)(D); see also 47 C.F.R. § 64.1510(c).

⁷¹ See 47 C.F.R. § 64.2400-2401; see also *Truth-in-Billing and Billing Format*, CC Docket No. 98-170, First Report and Order and Further Notice of Proposed Rule Making, 14 FCC Rcd 7492 (1999) (*Truth-in-Billing Order*).

⁷² 47 C.F.R. § 64.2401(b). See also *Truth-in-Billing Order*.

⁷³ *Truth-in-Billing and Billing Format*, Order on Reconsideration, 15 FCC Rcd 6023, at 6025, para. 5 (2000) (*Truth-in-Billing Reconsideration*).

⁷⁴ We note that the Commission’s billing rules specifically do not preempt states from adopting or enforcing their own consistent rules. 47 C.F.R. § 64.2400(b). For example, Florida has adopted a rule specifically aimed at pay-per-call problems. See *Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act*, Florida Public Service Commission Notice of Withdrawal of Petition to Initiate Rulemaking, filed January 26, 2004.

⁷⁵ 1996 Order & NPRM, 11 FCC Rcd at 14754-55, para. 46.

4. Revenue-sharing Arrangements

28. The definition of pay-per-call services found in section 228 rests on the requirement that such calls are only those calls to audiotext information services for which the caller pays a per-call or per-time-interval charge greater than or in addition to the "charge for transmission of the call."⁷⁶ Some businesses have used revenue-sharing arrangements to offer for-profit audiotext information services without pay-per-call regulation. The classic scenario is when an audiotext information service provider does not charge callers for the service outright, but instead receives a commission from a common carrier for the telephone traffic, which might be charged at a high rate.

29. In the *1996 Order & NPRM*, the Commission sought to address these types of evasions of consumer protections. The Commission tentatively concluded that certain revenue-sharing arrangements were in reality charging for more than just transmission of the call, even if the caller was not billed separately for the audiotext information service.⁷⁷ Specifically, the Commission tentatively concluded that any form of remuneration between a carrier and audiotext information services provider constituted per se evidence that the charge levied actually exceeds the charge for the transmission.

30. Accordingly, under this tentative conclusion, interstate services provided through such an arrangement would fit within the pay-per-call definition and, thus, be required to be offered exclusively through 900 numbers.⁷⁸ The *1996 Order & NPRM* also notes a staff letter which discussed several hypothetical scenarios in which revenue-sharing arrangements were used essentially to mask audiotext information services from pay-per-call regulation.⁷⁹ In the Marlowe Letter, the staff's opinion was that such scenarios would violate both section 228 and section 201(b).⁸⁰

31. In 2001, the Commission determined that the existence of a revenue-sharing arrangement between a common carrier and a chat-line service alone did not demonstrate that a carrier's conduct was unjust and unreasonable under section 201(b).⁸¹ Although the Commission noted in *Jefferson* that it was not addressing the application of section 228 to such a situation, the decision calls into question our basis

⁷⁶ 47 U.S.C. § 228(i)(1)(B). Section 228 defines pay-per-call as, any service providing 1) a) audio information/entertainment, or b) access to simultaneous voice conversation, or c) any service – including the provision of a product – where the charges are assessed on the basis of completion of the call; and 2) for which the caller pays a per-call or per-time charge greater than or in addition to the charge for transmission of the call. 47 U.S.C. § 228(i)(1).

⁷⁷ *1996 Order & NPRM* at 14756, para. 48. The Commission based its tentative conclusion on its authority under section 154(i), and addressed circumvention of section 228 through the language related to the cost of transmission.

⁷⁸ *1996 Order & NPRM* at 14756, para. 48.

⁷⁹ *1996 Order & NPRM* at 14742, para. 10.

⁸⁰ Letter from John Muleta, Chief of the Common Carrier Enforcement Bureau at that time, to Ronald Marlowe, 10 FCC Rcd 10945, DA 95-1905 (September 1, 1995) (*Marlowe Letter*). See 47 U.S.C. 201(b). Section 201(b) requires all charges and practices for and in connection with any common carrier communications services be just and reasonable. See also *infra*, para. 36.

⁸¹ *Jefferson*, 16 FCC Rcd at 16136, para. 13. (2001) (overruling Marlowe to the extent that it was not consistent with the conclusions in the Order). See also *Beehive*; *Jefferson*; *AT&T Corp. v. Frontier Communications of Mt. Pulaski, Inc.*, 17 FCC Rcd 4041 (2002) (follows *Jefferson*), *AT&T v. Atlas Telephone Co. and Total Telecommunications Services, Inc.*, 16 FCC Rcd 5726 (2001), *aff'd in part and remanded sub nom, AT&T Corp. v. F.C.C.*, 317 F.3d 227 (D.C. Cir. 2003); *dismissed, Atlas Telephone Co. v. AT&T Corp.*, File No. E-97-03, Order, 18 FCC Rcd 11533.

for our prior tentative conclusion in the *1996 Order & NPRM*.⁸² Thus, we no longer reach that tentative conclusion here. Instead, we invite commenters, including small carriers and small audiotext information service providers, to address the issue of revenue-sharing arrangements in light of the *Jefferson* decision. Parties should discuss whether it is possible or appropriate to find that any revenue-sharing arrangements do not comply with sections 228 even if such arrangements would not violate 201(b).⁸³

5. New and Evolving Services

a. Definition of Exempted Directory Services

32. Section 228 exempts "directory services" from the definition of pay-per-call.⁸⁴ In the *TDDRA R&O* implementing section 228, commenters asked the Commission to interpret the definition of "directory services" to include only "basic" directory services.⁸⁵ The Commission noted that a common carrier also operating as a provider of audiotext information services "cannot shield its information services from pay-per-call regulation by offering them through a directory services number."⁸⁶ In 2003, some commenters stated that ambiguities in this area persist.⁸⁷ They asked that the Commission "clarify" that enhanced directory services were exempt from pay-per-call.⁸⁸

33. Examples of such services mentioned in the comments to CC Docket No. 96-146 include such things as a service that allows subscribers to access directory listings by category, and then obtain additional information about the listing, upload personal contacts into a private database, and use a live operator to access their own personal data. Another service allows wireless subscribers to store personal address books on a network server and have voice-activated access to data with news, receive wake-up calls and get travel information "at no additional charge." Another proposed service would add more content such as information about the weather, and have partnerships with businesses to allow for such connections as transferring customers to places for ticket purchases.

34. In other proceedings, the Commission has already been presented with questions about the offering of directory services that are more than "traditional" operator provision of local telephone

⁸² *Jefferson*, 16 FCC Rcd at 16133 n.18.

⁸³ We note that commenters have brought to our attention legal and beneficial revenue sharing arrangements that exist in the telecommunications industry today. See Pilgrim Telephone, Inc. 2003 Comment at 10 (saying there are many examples in which carriers have compensation arrangements with call aggregators, universities, hospitals, hotels and airports); MicroVoice Application Inc. 2003 Comment at 3 ("there is a long history in the telecommunications industry for providing commissions for calls generated from pay phones, hotels and motels, shared residences, etc."); AT&T Corp. 2003 Further Comments at 10 n.10 (noting as legitimate arrangements Terminating Switched Access Arrangements (TSAAs) for high volume, international settlements required to be paid by U.S. carriers to foreign carriers, and commissions paid by carrier aggregators for operator traffic).

⁸⁴ 47 U.S.C. § 228(i)(2).

⁸⁵ *TDDRA R&O*, 8 FCC Rcd at 6887, para. 8.

⁸⁶ *TDDRA R&O*, 8 FCC Rcd at 6887, para. 9 n.23.

⁸⁷ Letter from Michael B. Hazzard, on behalf of Z-Tel Communications, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-146, at 2 (filed May 27, 2003) (Letter from Z-Tel Communications); AWS 2003 Comment at 6; Metro One Telecommunications 2003 Reply Comment.

⁸⁸ The Commission's rules, which mirror the statutory language, do not speak about which categories of services fall under the directory services exemption. Instead, the exemption just states that pay-per-call "does not include directory services provided by a common carrier or its affiliate or by a local exchange carrier or its affiliate..." See 47 C.F.R. § 64.1501(a)(4); see also 47 U.S.C. § 228(i)(2).

numbering. In the N11 numbering proceeding, some commenters had argued that Local Exchange Carrier (LEC) use of the 411 number should be restricted to the provision of "traditional" directory services, meaning operator provision of local telephone numbers.⁸⁹ The Commission declined to do so at that time, and instead concluded that a LEC could offer enhanced services using a 411 code, or any other N11 code, only if that LEC offered access to the code on a reasonable, nondiscriminatory basis to competing enhanced services providers.⁹⁰ In January 2002, the Commission released a Notice of Proposed Rulemaking in a related proceeding specifically asking whether allowing enhanced directory assistance to be available through presubscribed 411 would be consistent with Commission rules regarding pay-per-call and related services.⁹¹ We seek comment on the narrow question of how to further define "directory services" that are specifically exempt from the consumer protections of pay-per-call, regardless of whether any presubscription or comparable agreement exists.

b. Data Services

35. At least two commenters in 2003 claimed that data services are exempt from regulation under section 228 and another has suggested that uncertainty in this area might fluster development of nascent industries.⁹² However, section 228 has several provisions that allude to data services being pay-per-call services. First, section 228(f)(3) required the Commission to review the "extension of regulation under [section 228] with respect to persons that provide, for a per-call charge, data services that are not pay-per-call services."⁹³ In the *First TDDRA Order*, the Commission noted that the statutory definition of pay-per-call includes "data information services," but it did not find a need to warrant extension of regulation of section 228 outside pay-per-call data services.⁹⁴ In addition, section 228(c)(8) provides an exception to the criteria for written agreements for "any purchase of goods or of services that are not information services."⁹⁵ We seek comment on whether further clarification is needed on this topic of what data services fit within the pay-per-call definition. We seek specific comments on items that might be of significant concern for consumers and for developing businesses, including small businesses.

IV. MEMORANDUM OPINION AND ORDER IN CC DOCKET NO. 96-146

A. WKP Application for Review

36. In 1995, WKP Communications, Inc. (WKP) filed an application for review of a staff

⁸⁹ *The Use of N11 Code and Other Abbreviated Dialing Arrangements*, CC Docket No. 92-105, First Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 5572, 5600, para. 48 (*N11 First Report and Order*).

⁹⁰ *N11 First Report and Order*, 12 FCC Rcd at 5601, para. 48.

⁹¹ *Provision of Directory Listing Information Under the Communications Act of 1934, as Amended*, CC Docket No. 99-273; *The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, CC Docket No. 92-105; *Administration of the North American Numbering Plan*, CC Docket No. 92-237, Notice of Proposed Rulemaking, 17 FCC Rcd 1164, 1183, para. 37 (FCC 01-384) (*N11 NPRM*).

⁹² See AWS 2003 Comment at 6 n.12; Pilgrim Telephone, Inc. Reply Comment at 21 (contending that wireless data-based information services are not subject to section 228); see also *Ex Parte* filing, Mobile Entertainment Forum (questioning whether section 228 applies).

⁹³ 47 U.S.C. § 228(f)(3).

⁹⁴ See *First TDDRA Order* 8 FCC Rcd at 6892 and 6903, paras. 41, 99-100.

⁹⁵ 47 U.S.C. § 228(c)(8)(D).

interpretation given in the Marlowe Letter.⁹⁶ The letter gave an opinion of how, among other things, section 201(b) and 228 would apply to several hypothetical scenarios where international long distance service providers would be used to transmit information and entertainment services.⁹⁷ The scenarios described involved the transmission of calls by an authorized carrier at a tariffed rate through 10XXX dialing sequence, a 500 number, and a 700 number. Both the Marlowe Letter and WKP's Application for Review were drafted before the 1996 Act had gone into effect, and there was still an exemption for tariffed services under section 228.⁹⁸ In addition to Congress' removal of the tariffed exemption, the Commission has spoken twice on the issue of revenue sharing in general, first in the 1996 *Order & NPRM* and more recently in the chat-line orders discussed above.⁹⁹ Since filing its initial Application for Review, WKP has done nothing to update its Application for Review. Further, WKP has apparently ceased acting as a common carrier and Commission staff has been unsuccessful in reaching WKP to determine whether it wanted to pursue the Application for Review.¹⁰⁰ The Commission, therefore, dismisses this application as moot. We note that some of the general topics raised in the application for review, which went well beyond the scope of the letter, are raised in this NPRM.¹⁰¹

B. Florida Public Service Petition for Rulemaking

37. In 1995, the Florida Public Service Commission (FPSC) filed a Petition for Rulemaking with the Commission proposing, among other things, the establishment of a service to allow subscribers to have bill blocking, which would not be dependant upon the use of 900 numbers.¹⁰² In January 2004, the FPSC filed a notice withdrawing their petition.¹⁰³ Therefore, we dismiss the Petition for Rulemaking.

C. Closing CC Docket 96-146

38. Since the Commission released the 1996 *Order & NPRM* in CC Docket No. 96-146, the audiotext information services market, as well as related regulatory environment and technology have undergone significant changes. As noted earlier, the number of assigned 900 numbers, dropped from a peak of 447 in 1999 to 206 by the end of 2002 and many are no longer used by end users.¹⁰⁴ As noted

⁹⁶ *Direct Dialed Calls to International Information Services*, File No. ENF 95-20 (October 5, 1995) (WKP Application for Review). See also *WKP Communications Files Application for Review of Common Carrier Bureau Staff Ruling Regarding Provisions of Interstate Information Services at Tariffed Rates*, 10 FCC Rcd 11518 (rel. October 24, 1995).

⁹⁷ *Marlowe Letter*, 10 FCC Rcd 10945.

⁹⁸ The exemption for tariffed services was removed by the 1996 Act.

⁹⁹ See *supra*, paras. 29-32.

¹⁰⁰ Since 1998, all common carriers have been required to file 499A forms, but there is no record of WKP having done so. The law firm that filed the petition on behalf of WKP provided Commission staff with the last known address of WKP, and a letter sent to that address in September 2003 was returned as undeliverable.

¹⁰¹ See *supra*, paras. 29-32.

¹⁰² *Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act*, Florida Public Service Commission Petition to Initiate Rulemaking to Adopt Additional Safeguards, RM-8783, filed December 8, 1995 (FPSC Petition). See also *Office of Public Affairs, Reference Operations Division, Petitions for Rulemaking File*, Report No. 2127, Public Notice, April 1, 1996; Florida Public Service Commission 1996 Reply, RM-8783; and Florida Public Service Commission 1996 Comment.

¹⁰³ *Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act*, Florida Public Service Commission Notice of Withdrawal of Petition to Initiate Rulemaking, filed January 26, 2004.

¹⁰⁴ See *supra*, paras. 19-22.

above, many carriers decline to provide transport or bill for 900 numbers.¹⁰⁵ Consumers complain about different problems, as discussed above.¹⁰⁶ Regulatory changes included detariffing,¹⁰⁷ slamming verification,¹⁰⁸ and adjudication of formal complaints by the FCC¹⁰⁹ and outside agencies.¹¹⁰ Instant credit and electronic transactions are now common in e-commerce transactions.

39. As the comment cycle for the *1996 Order & NPRM* was completed before the rules actually took effect, the comments from 1996 provided no evidence of the impact of those rules. CGB's effort to refresh the record in this docket in 2003 was not met with extensive comment, nor a full range of views. Only 15 parties, most in the pay-per-call industry, submitted comments, replies, or *ex parte* filings, contrasting to the more varied 38 parties that had filed comments in response to the *1996 Order & NPRM*. Several of the parties argued that the record was too stale to reflect accurately the current market and regulatory environment.¹¹¹

40. It is clear that the subject of this proceeding has changed significantly from when the *1996 Order & NPRM* was released and when most comments were filed. While there are items in the comments and proposals that are still relevant, it would be impossible without further comment and review to ascertain which material is dated and which material is still viable. In the interest of administrative efficiency, therefore, we now close and terminate CC Docket No. 96-146. To the extent that parties believe portions of their 1996 comments are still relevant, parties should resubmit the relevant parts of such comments, if any, in this new docket. Parties refiling portions of comments are asked to do

¹⁰⁵ See *supra*, para. 20 note 57.

¹⁰⁶ See, e.g., *supra* para. 17 note 49.

¹⁰⁷ The Commission mandatorily detariffed interstate, domestic, interexchange services, including 900 transport service, provided by nondominant interexchange carriers. See *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934*, Second Report and Order, 11 FCC Rcd 20730 (1996), recon., 12 FCC Rcd 15014 (1997), stay granted, *MCI Telecommunications Corp. v. FCC*, No. 96-1459 (D.C. Cir. Feb. 13, 1997); Order on Reconsideration, 12 FCC Rcd 15014 (1997); Second Order on Reconsideration and Erratum, 14 FCC Rcd 6004 (1999); stay lifted and aff'd, *MCI WorldCom v. FCC*, 209 F.3d 760 (D.C. Cir. April 28, 2000), Memorandum Report and Order, 15 FCC Rcd 22321 (Com. Car. Bur. 2000); Common Carrier Bureau Extends Transition Period for Detariffing Consumer Domestic Long Distance Services, Public Notice, 16 FCC Rcd 2906 (Com. Car. Bur. 2001).

¹⁰⁸ See generally *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996/Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129.

¹⁰⁹ See, e.g., *Beehive v. AT&T*, 17 FCC Rcd 11641 (2002) (complainant failed to show revenue-sharing arrangement between carrier and information provider was unreasonable under section 201(b)) (section 228 claims not reached); *AT&T Corp. v. Frontier Communications of Mt. Pulaski, Inc.*, 17 FCC Rcd 4041 (2002) (follows *Jefferson*); *AT&T v. Atlas Telephone Co. and Total Telecommunications Services, Inc.*, 16 FCC Rcd 5726 (2001), *aff'd in part and remanded sub nom. AT&T Corp. v. F.C.C.*, 317 F.3d 227 (D.C. Cir. 2003) (unjust and unreasonable under section 201(b) but TDDRA claims dismissed), *dismissed, Atlas Telephone Co. v. AT&T Corp.*, File No. E-97-03, Order, 18 FCC Rcd 11533.

¹¹⁰ For example, the FTC charged defendants with violating TDDRA requirements by luring kids and other consumers to collect a prize and then rerouting their modem connections through a 900-number to charge them high per-minute phone rates. See "You've Just Won a Playstation 2! – or Maybe Not, Says FTC in Complaint Filed Against Internet Spammers," (rel. April 24, 2002), <<http://www.ftc.gov/opa/2002/04/btv.htm>>. States have also been active in this area.

¹¹¹ See, e.g., Letter from Z-Tel Communications at 1, Pilgrim Telephone, Inc. 2003 Comment at 20.

so with particularity.¹¹² Comments filed in 2003 in response to the *Notice* need not be filed again, as they will be included in this new rulemaking.

D. Correction of Word Error

41. The rules as adopted in 1996 contain a minor error in wording which is being corrected by this Order. In section 64.154(c)(2)(vi), the word "up" was omitted. We correct this sentence to read: "Clearly states that the caller can hang up at or before the end of the introductory message without incurring any charge whatsoever."

V. PROCEDURAL ISSUES

A. Ex Parte Presentations

42. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules.

B. Paperwork Reduction Act

43. This NPRM contain proposed and/or modified information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA). These proposed and/or modified information collection(s) will be submitted to the Office of Management and Budget (OMB) for review under section 3507 of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the proposed information collection(s) contained in this proceeding.

C. Initial Regulatory Flexibility Analysis

44. The Commission's Initial Regulatory Flexibility Analysis in this NPRM is attached as Appendix B.

D. Filing Instructions

45. We invite comment on the issues and questions set forth above. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before 30 days after publication in the Federal Register, and reply comments on or before 45 days after publication in the Federal Register. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998).

46. Comments filed through the ECFS can be sent as an electronic file via the Internet to <<http://www.fcc.gov/e-file/ecfs.html>>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply.

¹¹² Parties should only refile the particular pages from their comments that they believe to still be relevant.

47. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by electronic media, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail).

48. The Commission's mail contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings or electronic media for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial and electronic media sent by overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, S.W., Washington, D.C. 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. Parties who choose to file paper comments also should send four paper copies of their filings to Kelli Farmer, Federal Communications Commission, Room 4-C734, 445 12th Street, S.W., Washington, D.C. 20554.

49. If a party chooses to file by paper, one copy of each filing must be sent to the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), by mail at Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C. 20554; by e-mail at FCC@bcpiweb.com; by facsimile at (202) 488-5563; or by telephone at (202) 488-5300.

E. Materials in Accessible Formats

50. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at (202) 418-0530 (voice) or (202) 418-0432 (TTY). This NPRM can also be downloaded in Word and Portable Document Format (PDF) at <http://www.fcc.gov/cgb/policy/paypercall.html>.

VI. ORDERING CLAUSES

51. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1-4, 201(b), 228 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201(b), 228 and 303(r); and 47 C.F.R. § 64.1501-1515 of the Commission's rules, this Notice of Proposed Rulemaking, and Memorandum Opinion and Order is ADOPTED.

52. IT IS FURTHER ORDERED that the proceedings in CC Docket No. 96-146 ARE TERMINATED, and the docket is closed.

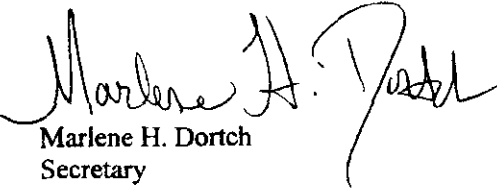
53. IT IS FURTHER ORDERED that the Petition for Rulemaking filed by the Florida Public Service Commission on December 8, 1995; and the Application for Review filed by WKP Communications, Inc., on October 5, 1995, are DISMISSED.

54. IT IS FURTHER ORDERED that 47 C.F.R. § 64.1504(c) is amended as set forth in Appendix A.

55. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice of Proposed Rulemaking, and Memorandum Opinion and Order, including the Initial Regulatory Flexibility Analysis, to the Chief

Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION


Marlene H. Dortch
Secretary

APPENDIX A**FINAL RULE**

For the reasons discussed in the preamble, Part 64 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 64 – MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority citation for part 64 continues to read as follows:

Authority: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201, 218, 226, 228, 48 Stat 1070, as amended, 1077; 47 U.S.C. 201, 218, 226, 228 unless otherwise noted.

2. Section 64.1504 paragraph (c)(2)(vi) is amended to read as follows:

(vi) Clearly states that the caller can hang up at or before the end of the introductory message without incurring any charge whatsoever.

APPENDIX B**Initial Regulatory Flexibility Analysis**

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this Notice of Proposed Rulemaking and Memorandum Opinion and Order (NPRM). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadline for comments on the NPRM provided above in the Comment Filing Procedures section paragraph 45. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).² In addition, the NPRM and IRFA (or summaries thereof) will be published in the Federal Register.³

A. Need for, and Objectives of, the Proposed Rules

2. The Commission has rules to afford consumers protection from deceptive practices associated with the provision of audiotext information services, and the use of toll-free numbers. In 1996, the Commission issued a Notice of Proposed Rule Making proposing rules which were intended to address potential circumvention of the regulations.⁴ Later, in March of 2003, the Commission issued a Public Notice seeking to refresh the record in the proceeding.⁵ In this NPRM, the Commission initiates a new proceeding to review the effectiveness of our rules governing pay-per-call services, related audiotext information services, and toll-free numbers. The Commission seeks comment on the state of the 900-number regime regulating pay-per-call services, the effectiveness of consumer protections relating to toll-free numbers, and to those audiotext information services accessed through dialing methods other than 900 numbers. We are interested in learning the extent to which consumer protections have been circumvented, and what steps we might take to protect consumers, including small business consumers, from such practices. In addition, we seek comment on changes in technology that warrant re-examination and clarification of these rules.

B. Legal Basis

3. The legal basis for any action that may be taken pursuant to this NPRM is contained in sections 1-4, 201(b), 228, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201(b), 228, and 303(r).

C. Description and Estimate of the Number of Small Entities to Which the Proposed

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² See 5 U.S.C. § 603(a).

³ See 5 U.S.C. § 603(a).

⁴ *Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services Pursuant to the Telecommunications Act of 1996*, CC Docket No. 96-146; *Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act*, CC Docket No. 93-22, Order and Notice of Proposed Rule Making, 11 FCC Rcd 14738 (1996).

⁵ *The Consumer & Governmental Affairs Bureau Seeks Comment to Refresh the Record on the Commission's Rules Governing Interstate Pay-Per-Call & Other Information Services*, CC Docket No. 96-146, Public Notice, DA No. 03-807 (rel. March 17, 2003) (2003 Notice).

Rules Will Apply

4. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules and policies, if adopted.⁶ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."⁷ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.⁸ A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.⁹

5. Small entities potentially affected by the policies and rules proposed herein include organizations, governmental jurisdictions, providers of audiotext information services, and providers of telecommunications and other services, including both wired and wireless services, such as operator service providers, prepaid calling card providers, and other toll carriers.

6. **Small Businesses.** Nationwide, there are approximately 22.4 million small businesses, according to SBA data.¹⁰

7. **Small Organizations.** A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."¹¹ Nationwide, there are approximately 1.6 million small organizations.¹²

8. **Small Governmental Jurisdictions.** The term "small governmental jurisdiction" is defined as "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."¹³ As of 1997, there were approximately 87,453 government jurisdictions in the United States.¹⁴ This number includes 39,044 county governments, municipalities, and townships, of which 37,546 have populations of fewer than 50,000 and 1,498 have populations of 50,000 or more. Thus, we estimate the number of small governmental jurisdictions overall to be up to 85,955.

1. Providers of audiotext information services

9. While the Commission's rules directly apply to common carriers that transmit and bill

⁶ 5 U.S.C. § 603(b)(3).

⁷ 5 U.S.C. § 601(6).

⁸ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

⁹ 15 U.S.C. § 632.

¹⁰ See SBA, Programs and Services, SBA Pamphlet No. CO-0028, at page 40 (July 2002).

¹¹ 5 U.S.C. § 601(4).

¹² Independent Sector, The New Nonprofit Almanac & Desk Reference (2002).

¹³ 5 U.S.C. § 601(5).

¹⁴ U.S. Census Bureau, Statistical Abstract of the United States: 2000, Section 9, pages 299-300, Tables 490 and 492.

subscribers for information services, other companies actually providing the information services might be indirectly affected. For example, audiotext information service providers that have used toll-free numbers to provide information services will be affected by the proposed limitations involving the use of toll-free numbers and mandatory written presubscription. These companies may experience an adverse economic impact in that they will have to change the manner in which they provide services to secure billing.

10. The Commission has only limited unverifiable information to predict either the total number of audiotext information service providers, or the percentage of providers that qualify as small entities. Audiotext Information Service providers are not subject to federal licensing or reporting requirements. In 1996, staff had been able to obtain from industry sources only an informal estimate that the total number of these entities operating, which at that time was noted as probably somewhere between 10,000 and 20,000 total operating entities.¹⁵ Although the Commission asked for comment as to the number of small businesses that would have been affected by regulations proposed in this area in 1996, the Commission received no data in comments. Even assuming that this rough estimate is correct, we cannot, with certainty identify what portion of such providers might be providing services in a manner that would subject them to the proposed regulations governing toll-free numbers and presubscription agreements, or predict what portion of all such providers are small businesses. We invite parties commenting on this IRFA to provide information as to the number of small businesses that would be affected by our proposed regulations and to identify alternatives that would reduce the burden on these entities while still ensuring that consumers are protected adequately.

11. **All Other Information Services.** "This industry comprises establishments primarily engaged in providing other information services (except new syndicates and libraries and archives)."¹⁶ We note that, in our Notice, we have described activities such as email, online gaming, web browsing, video conferencing, instant messaging, and other, similar Internet Protocol-enabled services. The SBA has developed a small business size standard for this category; that size standard is \$6 million or less in average annual receipts.¹⁷ According to United States Bureau of the Census (the Census Bureau) data for 1997, there were 195 firms in this category that operated for the entire year.¹⁸ Of these, 172 had annual receipts of under \$5 million, and an additional nine firms had receipts of between \$5 million and \$9,999,999. Consequently, we estimate that the majority of these firms are small entities that may be affected by our action.

2. Providers of Telecommunications and Other Services

12. We have included small incumbent local exchange carriers (LECs) in this present RFA analysis. As noted above, a "small business" under the RFA is one that, inter alia, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."¹⁹ The SBA's Office of Advocacy contends

¹⁵ 1996 Order & NPRM, 11 FCC Rcd at 14758, para. 57.

¹⁶ U.S. Census Bureau, "2002 NAICS Definitions: 519190 All Other Information Services" (online, February 2004, at www.census.gov).

¹⁷ 13 C.F.R. § 121.201, NAICS code 519190 (changed from 514199 in October 2002).

¹⁸ U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 514199 (issued October 2000). This category was created for the 2002 Economic Census by taking a portion of the superseded 1997 category, "All Other Information Services," NAICS code 514199. The data cited in the text above are derived from the superseded category.

¹⁹ 15 U.S.C. § 632.

that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.²⁰ We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

13. **Total Number of Telephone Companies Affected.** The Census Bureau reports that, at the end of 1997, there were 6,239 firms engaged in providing telephone services, as defined therein.²¹ This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, mobile service carriers, operator service providers, pay telephone operators, personal communications service (PCS) providers, covered small mobile radio (SMR) providers, and resellers. It seems certain that some of those 6,239 telephone service firms may not qualify as small entities because they are not "independently owned and operated."²² For example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It seems reasonable to conclude, therefore, that 6,239 or fewer telephone service firms are small entity telephone service firms that may be affected by the policies and rules proposed in this NPRM.

14. **Wired Telecommunications Carriers.** The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.²³ According to Census Bureau data for 1997, there were 2,225 firms in this category, total, that operated for the entire year.²⁴ Of this total, 2,201 firms had employment of 999 or fewer employees, and an additional 24 firms had employment of 1,000 employees or more.²⁵ Thus, under this size standard, the great majority of firms can be considered small.

15. **Incumbent LECs.** Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent LECs. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²⁶ According to Commission data,²⁷ 1,337 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,337 carriers, an estimated

²⁰ Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small-business concern," which the RFA incorporates into its own definition of "small business." See 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. See 13 C.F.R. § 121.102(b).

²¹ 1997 Economic Census, Establishment and Firm Size, U.S. Census Bureau, U.S. Department of Commerce, Economics and Statistics Administration, Document EC97S51S-SZ (1997 Economic Census), at 67.

²² 15 U.S.C. § 632(a)(1).

²³ 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in October 2002).

²⁴ U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513310 (issued October 2000).

²⁵ U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513310 (issued October 2000). The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1,000 employees or more."

²⁶ 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in October 2002).

²⁷ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, page 5-5 (August 2003). This source uses data that are current as of December 31, 2001.

1,032 have 1,500 or fewer employees and 305 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our proposed policies and actions.

16. **Competitive LECs, Competitive Access Providers (CAPs), and “Other Local Service Providers.”** Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²⁸ According to Commission data,²⁹ 609 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 609 carriers, an estimated 458 have 1,500 or fewer employees and 151 have more than 1,500 employees. In addition, 35 carriers have reported that they are “Other Local Service Providers.” Of the 35, an estimated 34 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, and “Other Local Service Providers” are small entities that may be affected by our proposed policies and actions.

17. **Local Resellers.** The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.³⁰ According to Commission data,³¹ 133 carriers have reported that they are engaged in the provision of local resale services. Of these, an estimated 127 have 1,500 or fewer employees and six have more than 1,500 employees. Consequently, the Commission estimates that the majority of local resellers are small entities that may be affected by our proposed policies and actions.

18. **Interexchange Carriers.** Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.³² According to Commission data,³³ 261 carriers have reported that they are engaged in the provision of interexchange service. Of these, an estimated 223 have 1,500 or fewer employees and 38 have more than 1,500 employees. Consequently, the Commission estimates that the majority of interexchange carriers are small entities that may be affected by our proposed policies and actions.

19. **Operator Service Provider (OSP).** Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.³⁴ According to Commission data,³⁵ 23 carriers have

²⁸ 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in October 2002).

²⁹ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, “Trends in Telephone Service” at Table 5.3, page 5-5 (August 2003). This source uses data that are current as of December 31, 2001.

³⁰ 13 CFR § 121.201, NAICS code 517310 (changed from 513330 in October 2002).

³¹ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, “Trends in Telephone Service” at Table 5.3, page 5-5 (August 2003). This source uses data that are current as of December 31, 2001.

³² 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in October 2002).

³³ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, “Trends in Telephone Service” at Table 5.3, page 5-5 (August 2003). This source uses data that are current as of December 31, 2001.

³⁴ 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in October 2002).

reported that they are engaged in the provision of operator services. Of these, an estimated 22 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that the majority of OSPs are small entities that may be affected by our proposed policies and actions.

20. **Prepaid Calling Card Providers.** Neither the Commission nor the SBA has developed a small business size standard specifically for prepaid calling card providers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.³⁶ According to Commission data,³⁷ 37 carriers have reported that they are engaged in the provision of prepaid calling cards. Of these, an estimated 36 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that the majority of prepaid calling card providers are small entities that may be affected by our proposed policies and actions.

21. **Other Toll Carriers.** Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to "Other Toll Carriers." This category includes toll carriers that do not fall within the categories of interexchange carriers, OSPs, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.³⁸ According to Commission's data, 42 companies reported that their primary telecommunications service activity was the provision of payphone services.³⁹ Of these 42 companies, an estimated 37 have 1,500 or fewer employees and five have more than 1,500 employees.⁴⁰ Consequently, the Commission estimates that most "Other Toll Carriers" are small entities that may be affected by our proposed policies and actions.

22. **Wireless Service Providers.** The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of Paging⁴¹ and Cellular and Other Wireless Telecommunications.⁴² Under both SBA categories, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 1997 show that there were 1,320 firms in this category, total, that operated for the entire year.⁴³ Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees

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³⁵ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, page 5-5 (August 2003). This source uses data that are current as of December 31, 2001.

³⁶ 13 C.F.R. § 121.201, NAICS code 517310 (changed from 513330 in October 2002).

³⁷ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, page 5-5 (August 2003). This source uses data that are current as of December 31, 2001.

³⁸ 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in October 2002).

³⁹ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, page 5-5 (August 2003). This source uses data that are current as of December 31, 2001.

⁴⁰ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, page 5-5 (August 2003). This source uses data that are current as of December 31, 2001.

⁴¹ 13 C.F.R. § 121.201, NAICS code 513321 (changed to 517211 in October 2002).

⁴² 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

⁴³ U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321 (issued October 2000).

or more.⁴⁴ Thus, under this category and associated small business size standard, the great majority of firms can be considered small. For the census category Cellular and Other Wireless Telecommunications, Census Bureau data for 1997 show that there were 977 firms in this category, total, that operated for the entire year.⁴⁵ Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.⁴⁶ Thus, under this second category and size standard, the great majority of firms can, again, be considered small.

23. Narrowband Personal Communications Services. The Commission held an auction for Narrowband PCS licenses that commenced on July 25, 1994, and closed on July 29, 1994. A second auction commenced on October 26, 1994 and closed on November 8, 1994. For purposes of the first two Narrowband PCS auctions, "small businesses" were entities with average gross revenues for the prior three calendar years of \$40 million or less.⁴⁷ Through these auctions, the Commission awarded a total of 41 licenses, 11 of which were obtained by four small businesses.⁴⁸ To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the *Narrowband PCS Second Report and Order*.⁴⁹ A "small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$40 million.⁵⁰ A "very small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$15 million.⁵¹ The SBA has approved these small business size standards.⁵² A third auction commenced on

⁴⁴ U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321 (issued October 2000). The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1000 employees or more."

⁴⁵ U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513322 (issued October 2000).

⁴⁶ U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513322 (issued October 2000). The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1000 employees or more."

⁴⁷ Implementation of Section 309(j) of the Communications Act – Competitive Bidding Narrowband PCS, *Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 10 FCC Rcd 175, 196, para. 46 (1994).

⁴⁸ See "Announcing the High Bidders in the Auction of ten Nationwide Narrowband PCS Licenses, Winning Bids Total \$617,006,674," *Public Notice*, PNWL 94-004 (released Aug. 2, 1994); "Announcing the High Bidders in the Auction of 30 Regional Narrowband PCS Licenses; Winning Bids Total \$490,901,787," *Public Notice*, PNWL 94-27 (released Nov. 9, 1994).

⁴⁹ Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS, *Second Report and Order and Second Further Notice of Proposed Rule Making*, 15 FCC Rcd 10456, 10476, para. 40 (2000).

⁵⁰ Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS, *Second Report and Order and Second Further Notice of Proposed Rule Making*, 15 FCC Rcd 10456, 10476, para. 40 (2000).

⁵¹ Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS, *Second Report and Order and Second Further Notice of Proposed Rule Making*, 15 FCC Rcd 10456, 10476, para. 40 (2000).

⁵² See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

October 3, 2001 and closed on October 16, 2001. Here, five bidders won 317 (Metropolitan Trading Areas and nationwide) licenses.⁵³ Three of these claimed status as a small or very small entity and won 311 licenses.

24. **Common Carrier Paging.** The SBA has developed a small business size standard for wireless firms within the broad economic census categories of Cellular and Other Wireless Telecommunications.⁵⁴ Under this SBA category, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 1997 show that there were 1,320 firms in this category, total, that operated for the entire year.⁵⁵ Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or more.⁵⁶ Thus, under this category and associated small business size standard, the great majority of firms can be considered small.

25. In the *Paging Second Report and Order*, the Commission adopted a size standard for "small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.⁵⁷ A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.⁵⁸ The SBA has approved this definition.⁵⁹ An auction of Metropolitan Economic Area (MEA) licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 2,499 licenses auctioned, 985 were sold.⁶⁰ Fifty-seven companies claiming small business status won 440 licenses.⁶¹ An auction of MEA and Economic Area (EA) licenses commenced on October 30, 2001, and closed on December 5, 2001. Of the 15,514 licenses auctioned, 5,323 were sold.⁶² One hundred thirty-two companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs commenced on May 13, 2003, and closed on May 28, 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses.⁶³ Currently, there are approximately 74,000 Common Carrier Paging licenses.

⁵³ See "Narrowband PCS Auction Closes," *Public Notice*, 16 FCC Rcd 18663 (WTB 2001).

⁵⁴ 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

⁵⁵ U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321 (issued October 2000).

⁵⁶ U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321 (issued October 2000). The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1000 employees or more."

⁵⁷ Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Second Report and Order*, 12 FCC Rcd 2732, 2811-2812, paras. 178-181 (*Paging Second Report and Order*); see also Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Memorandum Opinion and Order on Reconsideration*, 14 FCC Rcd 10030, 10085-10088, paras. 98-107 (1999).

⁵⁸ *Paging Second Report and Order*, 12 FCC Rcd at 2811, para. 179.

⁵⁹ See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

⁶⁰ See "929 and 931 MHz Paging Auction Closes," *Public Notice*, 15 FCC Rcd 4858 (WTB 2000).

⁶¹ See "929 and 931 MHz Paging Auction Closes," *Public Notice*, 15 FCC Rcd 4858 (WTB 2000).

⁶² See "Lower and Upper Paging Band Auction Closes," *Public Notice*, 16 FCC Rcd 21821 (WTB 2002).

⁶³ See "Lower and Upper Paging Bands Auction Closes," *Public Notice*, 18 FCC Rcd 11154 (WTB 2003).

According to the most recent *Trends in Telephone Service*, 608 private and common carriers reported that they were engaged in the provision of either paging or "other mobile" services.⁶⁴ Of these, we estimate that 589 are small, under the SBA-approved small business size standard.⁶⁵ We estimate that the majority of common carrier paging providers would qualify as small entities under the SBA definition.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

26. There are several compliance requirements addressed in this item. One, carriers are responsible for assuring that toll-free numbers, when they appear on a telephone bill, must appear in a separate section of the bill in order to make it easier for consumers to understand charges that stem from calls to toll-free numbers.⁶⁶ Carriers are already required to separate out a variety of calls, e.g. local versus long distance; therefore, we do not expect this compliance requirement to be particularly burdensome for carriers even small carriers. This is not a new requirement, just a clarification of an existing one.

27. Two, in order to operate outside 900 numbers, all audiotext information services – not only those using toll-free numbers – must be provided pursuant to a written (or the electronic equivalent) presubscription agreement or made through payments involving direct remittance, prepaid account, or debit, credit, charge, or calling cards.⁶⁷ These proposed policies and rules are designed to clarify the existing requirement that the presubscription or comparable agreement be in writing or make use of one of the payment methods discussed above. As such, any proposed policy or rule changes do not constitute an additional compliance burden.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

28. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."⁶⁸

29. Commenters, in 2003, noted that audiotext service providers found the 900 number regime has become a difficult environment in which to operate a business.⁶⁹ Some businesses

⁶⁴ See *Trends in Telephone Service*, Industry Analysis Division, Wireline Competition Bureau, Table 5.3 (Number of Telecommunications Service Providers that are Small Businesses) (May 2002).

⁶⁵ 13 C.F.R. § 121.201, NAICS code 517211.

⁶⁶ See *NPRM supra* paras. 25-27.

⁶⁷ See *NPRM supra* paras. 22-24.

⁶⁸ 5 U.S.C. § 603(c)(1) – (c)(4).

⁶⁹ See, e.g., Network for Online Commerce 2003 Comment at 8, Pilgrim Telephone, Inc. 2003 Comment at 2, HFT, Inc., Lo-Ad Communications T.B.I. and Global Charge 2003 Joint Comment at 13-14, Simpson 2003 Comment at 2.

complained that charges for audiotext information services were dropped from carriers' bills.⁷⁰ In order to address this concern we are considering allowing carriers to accept recordings of customer oral verifications as evidence that charges through 900 numbers should not be removed from the telephone bill.⁷¹ These verifications would indicate that the customer understood and agreed to the 900 number charges. We expect this alternative to assist small businesses, both carriers and audiotext information service providers, by facilitating billing on a telephone bill as opposed to a credit card or other such means. We note in the primary item that disputes over such charges were greatly reduced once oral verification was implemented in another country.⁷²

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

30. Federal Trade Commission (FTC) regulations pursuant to the Telephone Disclosure and Dispute Resolution Act (TDDRA),⁷³ prescribe federal standards governing some audiotext information service providers and all entities, including common carriers, which bill and collect for interstate information services.⁷⁴ The FTC has noted that the expansion of the definition of covered services under its governing statutes from Titles II and III of TDDRA, does not have any effect upon the main definition of pay-per-call services under Title I of TDDRA, codified as section 228.⁷⁵ The FTC initiated a proceeding in this area in 1998, but at this time it has not issued final conclusions.⁷⁶

⁷⁰ See *NPRM supra* para. 20.

⁷¹ See *NPRM supra* para. 21.

⁷² See *NPRM supra* para. 21.

⁷³ The Telephone Disclosure and Dispute Resolution Act of 1992, which added section 228 to the Communications Act of 1934, Pub.L. No. 102-556, 106 Stat. 4181 (1992) (codified at 47 U.S.C. § 228, and 15 U.S.C. §§ 5711-14 and § 5721-24).

⁷⁴ 16 C.F.R. §§ 308.1 *et seq.*

⁷⁵ "Pay-per-Call Rule; Proposed Rule," Federal Trade Commission, 63 Fed. Reg. 58524, 58525, n.18 (October 30, 1998).

⁷⁶ "Pay-per-Call Rule; Proposed Rule," Federal Trade Commission, 63 Fed. Reg. 58524.

APPENDIX C COMMENTERS

96-146 Commenters of 2003:

AT&T Corp.	
AT&T Wireless Services	AWS
Direct Marketing Association	
Federal Bureau of Investigation	FBI
James Fox	
Marilyn Fox	
HFT, Inc., LO-AD Communications, T.B.I. and Global Charge	
John P. Lawless	
MicroVoice Applications, Inc.	
Network for Online Commerce	
Northwest Nevada Telco	
Pilgrim Telephone, Inc.	
Adelle Simpson	Simpson
Z-tel Communications Inc.*	

96-146 Reply Commenters of 2003:

AT&T Corp.	
Metro One Telecommunications	
Pilgrim Telephone, Inc	
Adelle Simpson	Simpson

96-146 Commenters in 1996:

Alliance of Young Families	Young Families
American Network, Inc.	
AT&T Corp.	
California Public Utilities Commission	
Jacqueline K. Chockey	
Direct Marketing Association	DMA
Andrew Egendorf	
Excel Telecommunications, Inc.	
Florida Public Service Commission	FPSC
Federal Trade Commission	FTC
GTE Services Corp.	GTE
Representative Bart Gordon	
HFT, Inc., LO-AD Communications, Corp. and American International Communications	
Interactive Services Association	
International Telemedia Association	
MCI Telecommunications Corp.	
MOVO Media Inc.	
National Association of Attorneys General,	NAAG

* Filed as letter.

Telecommunications Subcommittee
Northern Mariana Islands, Commonwealth of
Ohio Public Utilities Commission
Pacific Bell and Nevada Bell
Pilgrim Telephone, Inc.
Schuyler County Economic Development Corp.
Southwestern Bell Telephone Co.
TeleServices Industry
Total Telecommunications, Inc.
University of Missouri-Columbia
United States Telephone Association

96-146 Reply Commenters in 1996:

900 Capital Services Inc.
Alliance of Young Families
AT&T Corp.
Atlantic Tele-Network, Inc.
Bellsouth Corp
GTE Service Corp.
HFT, Inc., LO-AD Communications, Corp.
and American International Communications
MCI Telecommunications Corp.
National Association of Regulatory Utility Commissioners
Ohio Consumer's Counsel
Pilgrim Telephone, Inc.
Starlink Communications, LLC
Southwestern Bell Telephone Co.
TeleServices Industry
Total Telecommunications, Inc.
US West Inc.
United States Telephone Association
Western Illinois University

NARUC